SUKMA DARMAWAN SASMITAAT MADJA *a*

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-116-98]
21 MAY 1999

CRIMINAL PROCEDURE: *Revision - Plea of guilty - Application to set aside conviction and sentence - Ex facie case for revision - Principles and procedure - Criminal Procedure Code, ss. 323, 325, 317 - Distinction and comparison between revisionary power of judge under Criminal Procedure Code and s. 35 of Courts of Judicature Act 1964* *c*

CRIMINAL PROCEDURE: *Appeal - Appeal specially allowed - Criminal Procedure Code, s. 310 - Application for extension of time to file petition of appeal - Consideration in exercise of judge's discretion - Period of extension applied for - Substantial justice - Strong grounds or reasons* *d*

CRIMINAL PROCEDURE: *Appeal - Notice of appeal - Signature of appellant or his advocate - Whether advocate who filed notice of appeal was appointed by appellant - Whether advocate appointed by appellant's family can act for appellant - Whether ratification can validate notice of appeal - Courts of Judicature Act 1964, s. 51(2)* *e*

CRIMINAL PROCEDURE: *Appeal - Conviction upon plea of guilty - Whether there is right of appeal against conviction - Whether court may grant extension of time to file petition of appeal against conviction - Whether court should look at petition of appeal first - Criminal Procedure Code, s. 305* *f*

The applicant had pleaded guilty to a charge under s. 377D of the Penal Code and was convicted and sentenced to six months' imprisonment on 19 September 1998 by the Sessions Court. A notice of appeal was filed by M/s Zulkifli Nordin & Assoc against both conviction and sentence on 29 September 1998. M/s Karpal Singh & Co has since been retained to take over the appeal. The applicant stated in his affidavit that the grounds of decision and the notes of evidence requested were given to M/s Karpal Singh & Co on 24 November 1998, which had then applied on 7 December 1998 for copies of the facts on the case and the confession from the court since these were missing from the record. The documents were supplied on 8 December 1998. On 9 December 1998, the Sessions Court issued a letter stating that since the applicant had failed to file a petition of appeal within time, he was deemed to have *g* *h* *i*

withdrawn his appeal. As a result, the applicant filed this application to the instant court on 10 December 1998 for an extension of time (two weeks) to file his petition of appeal and for the court to exercise its revisionary powers under s. 35 of the Courts of Judicature Act 1964 ('the CJA') and s. 323 of the Criminal Procedure Code ('the Code') and set aside his conviction and sentence.

Held:

[1] In an application for extension of time, the court must consider firstly, whether to grant an extension, and if so, whether the period of extension applied for is reasonable. The considerations upon the exercise of the discretion to grant an extension under s. 310 of the Code are that substantial justice be done and that there are strong grounds or substantial reasons.

[2] By virtue of s. 305 of the Code there is no right of appeal against conviction. The mandatory "shall" therein requires the court to apply the section strictly. The court should not lightly grant an extension of time to file a petition of appeal against conviction and sentence contrary to s. 305 of the Code without at least having first viewed the proposed petition of appeal.

[3] The words "his advocate" in s. 51(2) of the CJA requires that such advocate be appointed by the applicant, and not for the applicant. An advocate appointed by the applicant's family or any other person on the applicant's behalf and who has not at the material time obtained the applicant's authority, cannot be an advocate who may act for the applicant within the meaning of s. 51(2) of the CJA.

[4] The power of revision under the Code is given to the judge whilst under the CJA it is givven to the court. The power of the High Court under s. 35 of the CJA is wider than that of the judge under s. 323 of the Code. The power of revision must be used sparingly, with regard to all the circumstances of each particular case, for the purpose of preventing or correcting a miscarriage of justice.

[5] In order for the court to act in revision, the applicant must first show an *ex facie* case for the exercise of revision to be undertaken. As such, the application ought to be to apply to the court to call for and examine the record under s. 323 of the Code and to exercise its power under s. 325 to make an order under s. 317 to take further evidence. Only upon the carrying out of the revisionary exercise could the decision then be made to set aside the conviction and sentence.

[Application dismissed.]

Case(s) referred to:
Dorai Manickam v. Rex [1936] MLJ Rep 209 ***(refd)***
Jumari Mohamed [1982] 1 MLJ 282 ***(refd)***
Lee Boon Gan v. Regina [1954] 20 MLJ 103 ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 2 MLJ 69 ***(refd)***
Manokaran & Anor v. PP [1979] 1 MLJ 262 ***(refd)***
Masnelan Pakpahan v. PP [1989] 2 MLJ 362 ***(refd)***
Ooi Ah Phua v. Officer in Charge, Criminal Investigation, Kedah/Perlis [1975] 1 MLJ 198 ***(foll)***
Pitting Hj Mohammed Ali v. PP [1979] 2 MLJ 136 ***(refd)***
PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 ***(foll)***
PP v. Muhari Mohd Jani & Anor [1996] 3 MLJ 116 ***(refd)***
PP v. Soon Seng Sia Heng [1979] 2 MLJ 170 ***(refd)***
PP v. Sundaravelu [1967] 1 MLJ 79 ***(refd)***
Veerasingam [1958] MLJ 76 ***(refd)***
Wong Swee Chin v. PP [1977] 2 MLJ 194 ***(refd)***
Wong Swee Chin v. PP [1979] 2 MLJ 204 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35, 51(2)
Criminal Procedure Code, ss. 305, 307, 310, 317, 323, 325, 326
Penal Code, s. 377D

For the appellant - Karpal Singh (Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Mohd Yusof Zainal Abidin (Zauyah Loth Khan with him)

Reported by Farah Naim

JUDGMENT

Abdul Wahab Patail J:

This is an application by Sukma Darmawan Sasmitaat Madja (the applicant) for the following orders:

1. The applicant be granted an extension of two weeks from date of order of the Honourable Court to file petition of appeal;

2. The Honourable Court acts in revision under section 35 of the Court of Judicature Act, 1964 (Act 91) and section 323 of the Criminal Procedure Code and set aside the conviction and sentence of six months imprisonment imposed by the Sessions Court, Kuala Lumpur on the applicant on 19 September, 1998; and

3. Any further or other order deemed fit and proper by the Honourable Court.

Background

The applicant had pleaded guilty to a charge under s. 377D of the Penal Code on 19 September 1998. It was in respect of an alleged act of sodomy. The applicant was convicted thereon and sentenced to six months' imprisonment. According to the applicant, a notice of appeal was filed by his solicitors, Tetuan Zulkifli Nordin & Associates against both conviction and sentence on 29 September 1998. Karpal Singh & Co. has since been retained to take over the appeal. The applicant says in his affidavit that the grounds of decision and the notes of evidence requested by the applicant were given to Karpal Singh & Co. on 24 November 1998. Karpal Singh & Co. applied by a letter dated 7 December 1998 for copies of the facts of the case and confession from the court since these were missing from the record. These documents were supplied on 8 December 1998. On 9 December 1998 the Sessions Court issued a letter that since the appellant, meaning the applicant in this case, had failed to file a petition of appeal within time, he is deemed to have withdrawn his appeal. This application was filed on 10 December 1998.

No notice of appeal or other document was exhibited by the applicant to show that there was a request for the notes of evidence. The applicant relies on his own affidavit as follows:

> 4. On 29 September, 1998 through Tetuan Zulkifli Noordin & Associates a notice of appeal against both my conviction and sentence was filed.
>
> 9. ... that exhibit P1 (facts of the case) and D2 (my purported confession ...) form part of the notes of proceedings which had been specifically applied for in the notice of appeal filed on my behalf on 29 September 1998. .....

The learned DPP, Encik Mohd Yusof Zainal conceded that there was a request in the notice of appeal for the notes of evidence. On the face of it the applicant is entitled under s. 307(v) of the Criminal Procedure Code (the Code) to ten days from 9 December 1998 to file his petition. Assuming the letter of 9 December 1998 from the court was not issued, the applicant ought to have filed the petition of appeal on 19 December 1998. Since the Sessions Court had issued the letter of 9 December 1998 to say that the period to file the petition had expired and the appellant is deemed to have withdrawn the appeal, the proper course is for the appellant or his advocate to proceed to the High Court under s. 35 of the Courts of Judicature Act 1964 (the Act), or even the judge under s. 323 of the Code to make the appropriate order under their respective revisionary powers.

The applicant has however applied by the formal procedure of this notice of motion to the court in this proceeding for the orders set out above, and in support thereof has filed the lengthy affidavit of the applicant setting out various matters, and the respondent had accordingly filed his affidavits in reply, and now the court is required to deal with the matters advanced.

Before I proceed further, let us remind ourselves legal practice is the craft of the precise use of words and phrases. Partly for that reason there is the special profession of advocates and solicitors allowed to practice their craft before the Courts.

Application For Extension Of Time To File A Petition Of Appeal

While on the face of it there is a case made out to say that the Sessions Court letter of 9 December 1998 is in error, the applicant has elected to make his application as an application for an extension of time. In an application for an extension of time, the court must consider firstly whether to grant an extension, and if so, whether the period of extension applied for is reasonable. While there seem to be a basic case for an extension, no reason has been advanced to justify the two weeks from the date of the order as requested. Ordinarily two weeks is a very long time, since the statutory period in any case is ten days from the date the notes of evidence is served.

A copy of the proposed petition of appeal would be useful in order to see what the grounds and law involved, so as to determine whether the two weeks from the date of this Court's order is justified. While of course it would be unreasonable to expect the applicant to have exhibited the proposed petition of appeal when the application was filed on 10 December 1998, there is nothing to stop the applicant from filing the document later as was done for the affidavits of Dr Zahari Noor and Dato' Seri Anwar Ibrahim which were filed on 22 January 1999 and 31 December 1998 respectively. There is therefore no reasonable excuse why the proposed petition of appeal was not filed, and the court does not have the benefit of it to help it determine the appropriate period of extension.

In *Masnelan Pakpahan v. PP* [1989] 2 MLJ 362 Mohd Dzaiddin J (as he then was) held:

> the underlying principle of s. 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case ... it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal ...

The only fetter upon the exercise of the discretion of the judge to grant an extension under s. 310 is that "in order that substantial justice be done": see *Jumari bin Mohamed* [1982] 1 MLJ 282; *Veerasingam* [1958] MLJ 76; *PP v. Sundaravelu* [1967] 1 MLJ 79. There must be strong grounds or substantial reasons: *Wong Swee Chin v. PP* [1977] 2 MLJ 194 FC. Although the decision was overturned by the Privy Council in *Wong Swee Chin v. PP* [1979] 2 MLJ 204 PC, no reasons were given on law, and it must be taken that the Privy Councillors that on the facts there were no strong grounds.

For the purpose of determining the grounds for any period of extension, I have studied in detail the application, the affidavits filed by the parties and the submissions made. These are the evidence placed before me and I am duty bound to deal with them. Two matters are too conspicuous on the record in the affidavit evidence to be ignored, and may well constitute grounds of appeal if I do not deal with them.

Firstly, the appeal purports to be an appeal against both conviction and sentence. But s. 305 of the Criminal Procedure Code (the Code) specifically provides:

> When an accused person has pleaded guilty and being convicted by a magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

It is clear there is no right of appeal against conviction. The mandatory 'shall' requires the court to apply the section strictly. This only serves to underline the wisdom of the requirement in *Masnelan Pakpahan v. PP* to file a proposed petition of appeal. If a proposed petition of appeal is filed it will enable the court to see if there is proper basis in the appeal, so that a decision can properly be made according to the facts and the circumstances. The court should not lightly grant an extension of time to file a petition of appeal against conviction and sentence contrary to s. 305 of the Code without at least having first viewed the proposed petition of appeal. To do otherwise would be granting a blank cheque for an action plainly contrary to the Code.

Secondly, on the one hand, the applicant had said in his affidavit that the notice of appeal was filed on his behalf by Tetuan Zulkifli Noordin & Associates on 29 September 1998. On the other hand, Mohamed Noor bin Don in his affidavit for the respondent said:

> Di dalam pertemuan saya dengan Sukma pada 18 haribulan September 1998, 19 haribulan September 1998 dan 30 haribulan September 1998 Sukma tidak pernah memberitahu saya pada bila-bila masa pun bahawa saya bukanlah peguam yang dilantiknya sendiri. Beliau juga tidak pernah memberitahu saya pada bila-bila masa pun bahawa beliau mahu Encik Zulkifli Noordin, peguam

yang dilantik oleh kakak ataupun keluarganya ataupun Encik Karpal Singh untuk bertindak bagi pihak beliau. Ingin saya nyatakan bahawa Encik Zulkifli Noordin turut berada di dalam Mahkamah tidak jauh dan Sukma (yang berada di dalam kandang OKT) pada 19 haribulan September 1998.

The letter by Tetuan Zulkifli Noordin & Associates dated 29 September 1998 to Hj. Mohamed Nor bin Don did not exactly state they were the solicitors appointed by the applicant himself. It stated:

We have been instructed by Puan Komalawati Sasmita Atmadja (Indonesian Passport No. E 269474) sister of the above named, to take conduct of the criminal proceedings on his behalf. We are informed these instructions have been confirmed personally by Sukma Darmawan to his sister.

In addition, the applicant in a letter signed on 30 September 1998 and addressed to Mohamed Nor bin Don states:

KES MAHKAMAH SESYEN KUALA LUMPUR BKJ 7176/98

Saya merujuk kepada kes yang tersebut di atas yang dikendalikan oleh tuan bagi pihak saya dan di atas arahan saya pada 19hb September 1998.

Dengan ini saya ingin merakamkan secara bertulis bahawa saya mahu tuan terus menerus bertindak bagi pihak saya dalam perkara ini sekiranya ada tindakan lain yang perlu dibuat. Saya tidak bertujuan untuk membuat rayuan atau ulang bicara tentang hukuman yang dijatuhkan ke atas saya dan saya juga telah tidak melantik atau mengarah mana jua peguam lain, selain dari tuan, untuk bertindak bagi pihak saya. Arahan ini berkuatkuasa sehinggalah saya mengarahkan tuan sebaliknya secara hitam putih.

Indeed the notes of evidence of the proceedings on 19 September 1998 exhibited by the applicant himself shows the following at p. 3:

Encik Zulkifli b. Noordin bagi pihak keluarga OKT. Keluarga OKT mohon jasabaik untuk berjumpa OKT ...

And at p. 6:

Encik Zulkifli:

Keluarga OKT melantik saya untuk wakil OKT. Keluarga OKT tidak kenal peguam OKT. Keluarga OKT mempertikaikan perlantikan Encik Noor b. Don. Minta izin untuk bercakap.

The learned magistrate in her conclusion at p. 7 of the notes of evidence properly concluded:

Sebagaimana telah direkodkan dan dimaklumkan oleh Encik Zulkifli pada permulaan bahawa beliau ada wakil keluarga. Encik Zulkifli tidak dibenarkan hujjah lagi.

There was no affidavit to reply to the affidavit of Mohamed Nor bin Don. In view of the foregoing and the fact the references by the applicant to Zulkifli Nordin in paras. 15 and 19 were that the advocate was appointed by his family, I would conclude the assertions by Mohamed Nor bin Don that he was the counsel appointed by the applicant and still acting for him on 30 September 1998 is not disputed. In that case, it is follows that Zulkifli Noordin & Associates did not have the direct authority of the applicant to file the notice of appeal on 29 September 1998. As such the notice of appeal would be a nullity, having no legal effect. In *Ooi Ah Phua v. Officer in Charge, Criminal Investigation, Kedah/Perlis* [1975] 1 MLJ 198 FC, was a case where solicitors were appointed by the father of a person arrested by the police. In its decision the Federal Court made a careful distinction between the right of the arrested person to consult counsel and the right of counsel, and held that *habeas corpus* does not apply where the complaint was that the solicitor was denied access to him. In my view the case shows that the counsel must be appointed by the client himself and not by someone else.

In the light of this there is much to be said for the decision of *Pitting bin Haji Mohammed Ali v. Public Prosecutor* [1979] 2 MLJ 136 which held that the appellant must personally sign the notice of appeal. In this I am mindful of the provision of s. 51 Courts of Judicature Act 1964 which provides:

> 51 Notice of appeal
>
> (1) Every appeal shall be by notice in writing which shall be filed with the Registrar of the Court from which the appeal lies at the place where the decision appealed against was given within fourteen days after the date of the decision.
>
> (2) Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and, except where the notice of appeal is given orally under section 54, shall be signed by the appellant or his advocate:
>
> [Provided that, in a case of an appeal under section 50(2), the computation of the aforesaid period of fourteen days shall commence from the date immediately after leave has been granted by the Court of Appeal.]

The failure to reply to the affidavit of Mohamed Noor bin Dom leaves no room for any conclusion other than that Zulkifli Noordin & Associates was not the advocate appointed by the applicant on 29 September 1998 when the notice of appeal was filed. The qualification 'his' to advocate in s. 51(2) in my mind requires that such advocate must be appointed by the appellant, and not an advocate appointed for him. The right of appeal accrues only to the person 'dissatisfied with any judgment, sentence or order ... in a criminal case

or matter to which he is a party ...' (see s. 307(i) Criminal Procedure Code). No matter how understandable it is for the family of the applicant to be concerned on his behalf, an advocate appointed by his family or any other person and who has not at the time obtained his authority, be an advocate who may act for the applicant within the meaning of s. 51(2).

I have further considered whether ratification of the action of Tetuan Zulkifli Noordin & Associates may be accepted to validate the notice of appeal that was filed. To read s. 51(2) so widely that any advocate may sign a notice of appeal subject to subsequent ratification, would result in allowing speculative notices being filed by advocates, to be ratified by prospective appellants well beyond the 10 day period specified by s. 307(i) of the Code. Such a result cannot be intended by s. 307(i) of the Code or s. 51(2) of the Courts of Judicature Act 1964.

I find in the circumstances that the notice of appeal filed by Tetuan Zulkifli Noordin & Associates on 29 September 1998 to be without authority of the applicant at the time it was filed, and therefore void. It serves no purpose of substantial justice therefore to grant any extension to file any petition of appeal. For this reason alone the application for extension of time ought to be rejected.

I have also considered whether the extension of two weeks from the date of the order should be granted. This application is heard on the basis of affidavit evidence. Yet there is no evidence why two weeks is necessary. Particularly in view of the admitted fact the two documents, being the statement of facts and the confession, were received on 8 December 1998, there ought to be exhibited a copy of the proposed petition of appeal, such that a period less than two weeks could be considered, or alternatively, evidence why such proposed petition of appeal could not be prepared and exhibited at any time between 19 December 1998 and the date of this hearing, fixed upon the written request by the applicant. Added to this is that the evidence before the court shows that the authority of Tetuan Zulkifli Noordin & Associates is highly questionable. For these reasons I would also reject the application for two weeks extension.

Application That The Court Acts In Revision Under s. 35 Of The Courts Of Judicature Act 1964 And s. 323 Of The Criminal Procedure Code And Set Aside The Conviction And Sentence Of Six Months Imprisonment Imposed By The Sessions Court, Kuala Lumpur On The Applicant On 19 September 1998

The application seeks the court to act in revision and set aside the conviction and sentence. The applicant prevails upon s. 323 of the Criminal Procedure Code (the Code) and s. 35 of the Courts of Judicature Act 1964 (the Act). Generally the basis of the power of the High Court to act in revision begins with s. 31 of the Act. It provides:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

The law relating to criminal procedure is the Criminal Procedure Code. The Code, predating the court however gives powers of revision in Chapter XXXI of the Code to the judge. In such circumstances the conclusion is that the legislature intended in the Act to create an additional avenue of revisionary power, not just through the judge, but also formally through the court. Given the careful distinction between usage of the terms 'Court', 'Judge', and 'magistrate', it must be concluded that the distinctions are intended. Thus the application for the court to act in revision under s. 323 of the Code cannot be correct.

Nevertheless the applicant has also applied under s. 35 of the Courts of Judicature Act which provides:

> 35 General supervisory and revisionary jurisdiction of High Court
>
> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
>
> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

The power of the High Court under s. 35 is wider than that of the judge under the Code: *Manokaran & Anor v. PP* [1979] 1 MLJ 262. It is obvious from the terms of the section it is not intended to be limited by s. 31 which makes provision for revisionary powers to be provided under laws relating to criminal procedure. The power given to the judge in s. 323 of the Code predates the Court of Judicature Act, and must be taken as a power separate from that enabled by s. 31 of the Courts of Judicature Act. Nevertheless, whether a revision is conducted by a judge under s. 323 of the Code or by the court under s. 35 of the Courts of Judicature Act, the underlying principles for the exercise of the power must be consistent. I am much indebted to the decision of KC Vohrah J in *PP v. Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116 where he has set out the principles applying to the exercise of the powers of revision. There is apparently some confusion in generally referring to the power

given to the judge under the Code as a power of the High Court, but note the correct usage in *Liaw Kwai Wah & Anor v. PP* [1987] 2 MLJ 69 SC. The power of revision is to be used sparingly, with regard to all the circumstances of each particular case, for the purpose of preventing or correcting a miscarriage of justice. Wide as the power may be, it has to be exercised judicially. In *Dorai Manickam @ Davies v. Rex* [1936] MLJ Rep 209, it was held that where a party to a criminal proceedings who has had the opportunity to appeal under the appeal provisions but neglects without very good reason to do so, he will not be allowed to call in aid the powers of revision; and where it is proper to do so it must be made at the first possible moment.

The record of proceedings clearly shows that the charge was read and explained to the applicant. He pleaded guilty and it was elicited from him that he understood the nature of his plea of guilt. The prosecution then presented the facts of the case and it was explained to him. The applicant admitted to the facts without dispute. In his mitigation the applicant, *inter alia*, tendered the confession he made before the magistrate. This clearly shows he understood the consequences of his plea of guilt and the nature of the offence he had committed. The court then accepted the plea of guilt and sentenced him accordingly. The grounds of judgment of the learned session court judge confirms the correctness and legality of the finding and sentence passed by the court. On the face of the record there is no miscarriage of justice and therefore no valid reason for the court to exercise its discretionary power to set aside the conviction and sentence imposed by the Sessions Court on the applicant. On the face of the record the proceedings were entirely regular.

The basis of the application is that the plea was made under duress and was a nullity. The applicant seeks to substantiate this by affidavit evidence. A summary of the applicant's assertions in his affidavit is as follows:

- **Paragraph 11:** He was stripped naked in an air-conditioned room, roughed up, handcuffed by six police officers, humiliated, abused and beaten.
- **Paragraph 12:** He was stripped naked, photographed before a forensic doctor, when various samples were taken from him and subjected to a painful examination by the doctor.
- **Paragraph 13:** He was subjected to violence and threats unless he confessed to homosexual activities with Dato' Seri Anwar Ibrahim.
- **Paragraph 14:** He was given delicious food and drinks, allowed to wear clothes and the handcuffs were removed after he made up and related untrue stories of homosexual relationship with Dato' Seri Anwar Ibrahim, resulting in an untrue confession being made on 17 September 1998.

- **Paragraph 15:** He was denied services of a lawyer of his choice, threatened against the use of a lawyer appointed by his family, and threatened with a more serious charge unless he employed a police-appointed lawyer.

- **Paragraph 16:** He had resolved to appoint Karpal Singh, but was unable to do so; and instead the police had asked him on several occasions to lodge a police report he had not appointed any lawyer.

- **Paragraph 17:** He had met Karpal Singh and his son for the first time on 18 November 1998 and related to him that he had pleaded guilty to the charge on 19 September 1998 in fear and not of his own volition.

- **Paragraph 18:** He had been compelled to falsely implicate Dato' Seri Anwar Ibrahim and his plea of guilt on 19 September 1998 was not of his own free will but under extreme duress.

- **Paragraph 19:** He did not appoint Mohamed Noor bin Don as his counsel, was denied counsel of his choice, and counsel appointed by his family to represent him was not allowed to address the court.

The only material and relevant part of the affidavit of Dato' Seri Anwar Ibrahim is that he denied having committed the act of sodomy upon the applicant. The affidavit of Dr Zahari bin Noor made on 22 January 1999 discloses he was the forensics doctor who examined the applicant for the police on 9 September 1998, and is to the effect that:

> Pemeriksaan yang saya lakukan diatas pemohon menyebabkan saya memutuskan tiada kecederaan di tubuh badan pemohon, samada baru ataupun lama. Pemeriksaan zakar beliau menunjukkan tiada kesan kecederaan ataupun apa jua abnomaliti fisikal. Pemeriksaan dubur pemohon menunjukkan tiada bukti bahawa apa jua objek tumpul telahpun memasuki dubur pemohon, samada baru-baru ini ataupun sebaliknya.

A medical report made after the examination was also attached.

In *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702; [1997] 3 MLJ 477, the following passage appears in the judgment of the Court of Appeal:

> Before leaving the subject, we would like to make one other observation. During the proceedings before the High Court, a number of affidavits were filed both by the prosecution as well as by the respondent for the consideration of the learned judge. In exercising his power under s. 325 of the CPC, the learned judge has to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. In order to do this, he has to examine the record of the proceedings of which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine himself only to the record of

> the proceedings and nothing else. An application for revision being essentially a criminal proceeding, it is our view that affidavit evidence has no place in such proceedings.

PP v. Audrey Keong Mei Cheng is authority that affidavit evidence has no part in revision proceedings. Indeed no party has a right to be heard in revision proceedings: see s. 326 of the Code. In *Lee Boon Gan (f) v. Regina* [1954] 20 MLJ 103, Spenser Wilkinson, J stated the principle in the following words:

> Although I can find no direct authority on the subject I am of opinion that for the purposes of an appeal the record is conclusive. Counsel for the appellant suggested that under my revisionary powers I could receive affidavit evidence in regard to this matter and affidavits were, in fact, filed by the appellant, her husband and a friend of hers and a counter affidavit was filed by the Court interpreter.
>
> Whilst I am not prepared to say, as at present advised, that there are no circumstances in which the accuracy of the record can be gone into on revision, particularly under the very wide powers of revision now given to High Court by section 57 of the Courts Ordinance, 1948 I did not think that this was a case in which this could or should be done. Moreover, I know of no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court. There are circumstances in which certain applications can be made in appeals by motion in which case it should be proper to file affidavits in support of the motion, but in my opinion affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

It is evident then that the application as it stands, that is, for the Court to act in revision and set aside the conviction and sentence is misconceived. The error is apparent from a careful reading of *PP v. Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116. The applicant must first be able to show an *ex facie* case for the exercise of revision to be undertaken. Thus the application ought to be to apply to the court to call for and examine the record under s. 323 of the Code and to exercise its power under s. 325 to make an order under s. 317 of the Code to take further evidence. Only upon the carrying out of the revisionary exercise may the decision then be made to set aside the conviction and sentence or to make any other order as circumstances may require.

The allegations in the affidavit of the applicant were denied by Mohamed Noor bin Dom, the advocate purportedly appointed by the police; ASP Ahmad Kamil bin Dato' Ahmad; SAC Musa bin Hj. Hassan; ASP Mohd. Rodwan bin Hj. Mohd. Yusof and C/Insp. Sampornak bin Ismail. These affidavits were filed on 18 December 1998. Given however that affidavits of Dato' Seri Anwar Ibrahim and that of Dr. Zahari bin Noor were filed on 31 December 1998

and 22 January 1999 respectively supporting the affidavit of the applicant filed on 10 December 1998, and giving these latter affidavits a liberal interpretation, I conclude that at the very least the matters remain at issue. It is important to remember that affidavit evidence serves a very limited purpose, that is for setting out sworn testimony, and the court may make findings only to the extent a fact is admitted or not disputed, which differs from oral testimony tested by cross-examination where the court is in a position to assess credibility and to make a finding. In view of the fact the assertions in the affidavit evidence that the applicant has elected to proceed upon is disputed, the court must rule the allegations are not proven and cannot therefore justify ordering the conviction and sentence to be set aside as applied for.

Since the application is before me, and notwithstanding that the application as currently formulated is misconceived, I have proceeded further to consider whether I, as a judge, should act under Chapter XXXI of the Code and order that a revision be commenced. However, taking into account that Dato' Seri Anwar Ibrahim has been charged with an offence for the same act, and that the case is pending trial in the High Court in Criminal Trial 45-52-98, I conclude it is wrong to consider a revision at this point of time. In *PP v. Soon Seng Sia Heng* [1979] 2 MLJ 170 FC it was held that where there is an appeal to the Federal Court, an application by that person for review will be dismissed. A similar principle should apply although the accused in Criminal Trial 45-52-98 is a different person because both cases arise from the same event, and the truth is best determined in a full trial. I would therefore refrain from undertaking such a course.

Inherent in the application and affidavit of the applicant is the suggestion that he could not inform the court when he pleaded guilty that he was doing so under duress or in fear. How much credence can be given to this? The trial is not a closed door trial. There is no such thing in this country. The trial is in public. The trial is open to public scrutiny. These days the public scrutiny is not limited to those who find seats in the courtroom, but even those outside the courtroom, the city, and the country. To my mind, provided there is accurate reporting, this is the best guarantee to every individual. In addition there are the avenues of appeal and revision. In other words, the proceedings are subject to scrutiny by appellate courts, whose proceedings are also in public. Any action that is improper or wrong is immediately apparent and soon reported. One word therefore of protest by the applicant in that court, would be heard not just by the judge but also by everyone in the court and soon, everyone outside the court. Every magistrate and judge is aware of this, and regard this as his source of protection. Mere appearances of propriety pales in importance since his actions and decisions will speak louder than appearances. Very little credence can therefore be given to excuse given for

not telling the court he did not intend to plead guilty. Indeed once charged he would be in prison custody, and out of the clutches of those he professes to fear. The laws governing our prisons maintain the prisons as separate from the police department, and the police has to apply to the director-general of prisons to be able to 'borrow' the prisoner or person under remand for other investigations, and after which they must be returned to the prison.

I note there are no assertions of complaints with regard to his plea, to the judge of the sessions court or prisons officials, being ignored by these persons. The humblest prisoner has always been assisted by the prisons department to prepare and file his notice of appeal. Yet although he was delivered to the prison on 19 September 1998, he did not file any notice. The notice of appeal filed on 29 September 1998 was filed by an advocate not appointed by him but by his family.

The applicant has therefore not shown any credible evidence that his plea of guilty as such is not his own voluntary act. I have also considered whether this application in effect negates any indulgence given to the sentence passed upon him because of his plea of guilty. However in all the circumstances of this case I believe it is sufficient to dismiss the applications.

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